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In the Supreme Court of the United States

APRIL TERM, 1926

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Petitioner

v.

WESTERN UNION TELEGRAPH COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of United States Shipping Board Emergency Fleet Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia, entered in the above case June 1, 1926 (R. 64), affirming the judgment of the Supreme Court of the District of Columbia. (R. 53.)

QUESTIONS PRESENTED

There is no dispute as to the facts, as the case was tried without a jury (R. 53) upon an agreed statement (R. 5) without further testimony (R. 56). The case involves:

(1) A determination of the extent of the right of the Government of the United States to priority in transmission of telegraph messages paid for

with public funds and to a rate thereon fixed annually by the Postmaster General, pursuant to Section 5266 R. S. (originally "Post Roads Act," approved July 24, 1866, 14 St. L. 221):

(2) A determination whether such priority and "government rate" shall be accorded to the messages of petitioner in carrying out the duties and functions duly delegated by the United States Shipping Board pursuant to the Merchant Marine Act, 1920 (41 St. L. 988), where the cost of the messages is borne by public funds and not paid for out of corporate funds of the petitioner.

STATEMENT

Respondent, a New York corporation, sued petitioner in the Supreme Court of the District of Columbia to recover charges at the "commercial rate" for certain telegraph and cable messages despatched at the request of petitioner over respondent's lines during June and July, 1922. (R. 1.) After the suit was filed the sum due for such messages at the "government rate" was paid pursuant to a stipulation (R. 24, 25) and the case proceeded to recover the difference between the "commercial rate" and the "government rate," both parties agreeing that it should be expedited to a final determination by this Court as a test case. This stipulation was filed October 19, 1922, prior to the 1925 amendment of the Judicial Code, and when the questions involved were subject to review by this court as a matter of right.

The agreed statement of facts (R. 5) showed that all the messages in controversy concerned the activities of petitioner in carrying out the functions and duties (R. 14) delegated to it by resolution of the United States Shipping Board adopted September 30, 1921 (R. 30), pursuant to express authority contained in Sections 12 and 35 of the Merchant Marine Act, 1920, and that the form used for such messages bore the caption " Official Telegram—Government Rate." (R. 17.) Further, that continuously from the year 1867, when respondent filed its written acceptance of the restrictions and obligations imposed and required by the Act of July 24, 1866 (R. 6, sec. 6), up to May 23, 1922 (R. 6, sec. 4), respondent had accorded priority in transmission and the " government rate " as a matter of course, not only to those Executive Departments headed by a Cabinet Officer but also to numerous Government Boards, Commissions, Bureaus, and Corporations, including your petitioner (R. 18, 19, sec. 17).

Respondent contends (1), that petitioner was neither a department of the government, *nor an officer or agent thereof*, within the meaning of Section 5266 R. S.; and (2), that even though the first contention is held untenable some of the messages in controversy were not " between " the petitioner and another government department, its officers or agents, as provided in the statute, and as to such messages respondent is not obligated to extend priority or the " government rate " but is entitled to the " commercial rate," pursuant to the

Interstate Commerce Act, as amended. (Sec. 3, 38 St. L. 544) (R. 2, 6.).

Petitioner's position is:

1. That in despatching the messages in controversy, the petitioner was acting as an agent of a Department of the Government, within the meaning of Section 5266 R. S., by virtue of the authority duly delegated to petitioner by resolution of the United States Shipping Board as expressly contemplated and provided in Sections 12 and 35 of the Merchant Marine Act, 1920.

2. That respondent is obligated to accord priority and the " government rate " on all messages pertaining to the Government's activities which must be paid for from funds in the Treasury or otherwise which belong to the government and this obligation exists irrespective of whether such messages are interdepartmental altogether or are messages sent by or to a department of the Government, its officers and agents, to or by outside persons.

The trial court decided that respondent was entitled to recover the "commercial rate" on all of petitioner's messages and entered judgment for respondent in the sum of $1,407.59. (R. 53.) The Court of Appeals of the District of Columbia, in affirming the judgment of the trial court, after stating that "the mere fact that the United States owns stock in a corporation does not vest the corporation with rights belonging to the Government

in its sovereign capacity," concluded its opinion, as follows (R. 63):

> "While the service obtained from the Telegraph Company may in part have been employed in relation to Government business, it was the separate contractural obligation of the corporation, totally independent of any direct authority derived from the President. It logically follows that no contract is here involved with which the President, in carrying out the provisions of the Act of 1917, was in any way concerned. The service was performed for the Corporation, and the mere fact that some of it may have been rendered in connection with Government business in no way affected the corporate status of the Fleet Corporation or converted it into either a Department of the Government of the United States or an agent, or officer of a Department, within the purview of section 5266, Rev. Stat., supra."

The Court of Appeals mistook petitioner's contentions. The Act of 1917, under which the President acted, and referred to in the court's opinion, was repealed by the Merchant Marine Act, 1920. Your petitioner's actions were pursuant to the last-mentioned Act. No contention was made that the President was concerned at all or that petitioner was acting under authority derived from him.

Moreover, the Court of Appeals made no reference anywhere in its opinion to any of the provisions of the Merchant Marine Act, 1920, nor to the resolution of the United States Shipping

Board (R. 14, 30) delegating its duties and functions thereunder to petitioner, under which authority petitioner was acting in despatching the messages.

For the language of the statutes involved and a statement of additional facts, reference is made to the supporting brief included herein.

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals of the District of Columbia has decided a question of substance and public interest, affecting the revenues of the United States, which has not been but should be settled by the Court of last resort. The effect of the decision of said court is that the respondent may now disregard the settled and accepted construction placed upon a Federal statute for forty-nine years by the Government of the United States and by the respondent, who received substantial benefits under said statute, whereby respondent and other telegraph companies will be enabled to charge and collect, either directly or indirectly, from the revenues of the United States, a sum estimated by petitioner's auditors to be more than $267,000.00 in excess of the "government rate" provided for in said statute, for messages despatched subsequent to July, 1922, and will be enabled hereafter to deny priority to the transmission of petitioner's messages pertaining to the business of the government.

II

The Court of Appeals of the District of Columbia has decided a question of substance and great public interest relating to the construction of the Act of July 24, 1866 (14 St. L. 221, R. S. 5266), entitled an "Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes," the decision being to the effect that the United States is not entitled to the "government rate" or to priority in transmission of telegraph messages despatched by your petitioner. In making this decision the said Court of Appeals did not give proper effect to the provisions of the Merchant Marine Act, 1920, and particularly to Sections 12, 14, and 35 thereof, nor to 42 St. L. 444, and did not give proper effect to the applicable decisions of this court.

III

The ultimate decision of this test case will also determine whether respondent and other telegraph companies who have accepted the benefits of the Act of July 24, 1866, may deny those benefits to other agents of the Government, corporate and otherwise, which bear the same relation to the Government as that occupied by your petitioner.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judg-

ment of the Court of Appeals of the District of Columbia should be granted.

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BRIEF IN SUPPORT OF PETITION

OPINION OF THE COURT BELOW

The decision of the trial court, Supreme Court of District of Columbia, will be found in the Bill of Exceptions. (R. 55, 56.) The opinion of the Court of Appeals of the District of Columbia will be found at pages 59–63 of the record.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was rendered on June 1, 1926, (R. 64). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 St. L. 936).

STATUTES INVOLVED

The Post Roads Act.—This Act (approved July 24, 1866, 14 St. L. 291) originally contained four Sections, and, with minor amendments, is now contained in Sections 5263 to 5269, Revised Statutes. This case involves particularly the construction of Section 5266, R. S., which provides as follows:

> "Telegrams between the several Departments of the Government *and their officers and agents* in their transmission over the lines of any telegraph company to which has been given the right of way, timber or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall an-

nually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section." (Italics ours.)

The Merchant Marine Act, 1920.—The pertinent sections of this Act approved June 5, 1920 (c. 250, 41 St. L. 988), are:

"SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the 'Shipping Act, 1916,' to the contrary notwithstanding."

"SEC. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the 'Shipping Act, 1916,' or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the pur-

poses of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts."

"SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation."

Acts providing for Accounting to United States.—**Sundry Civil Act, approved July 1, 1918 (40 St. L. 651), provided:**

> "The Secretary of the Treasury is authorized and directed to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation under such rules and regulations as he shall prescribe."

The Second Deficiency Act, approved March 20, 1922 (42 St. L. 444), provided:

> "The Comptroller General of the United States is authorized and directed to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation, in accordance with the usual methods of steamship or corporation accounting and under such rules and regulations as he shall prescribe. Such audit shall be effective commencing July 1, 1921, the date of the discontinuance of the audit required to be performed under the direction of the Secretary of the Treasury by the Act approved July 1, 1918."

Appropriation Acts.—The Sundry Civil Act, approved June 5, 1920 (41 St. L. 874), under the title "Shipping Board," provided:

> "The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges, and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the

following sources: (a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed $15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed $25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed $30,000,000 from ships sold during the fiscal year 1921."

The appropriation Acts of subsequent years contain similar provisions and may be found as follows: 41 St. L. 1367; 42 St. L. 29, 192, 635, 1227; 43 St. L. 521, 1198; and Pub. No. 141, 69th Cong.

THE FACTS

The following additional facts will be found in the agreed statement (R. 5) or are judicially known:

On June 8, 1867, respondent accepted the benefits and assumed the obligations of the Post Roads Act (14 St. L. 221) and thereby became obligated to give priority to "telegraphic communications between the several departments of the Government of the United States and their officers and agents" at the rates to be annually fixed by the Postmaster General, (R. 6). Respondent charges the public generally certain uniform rates, commonly called "commercial rates," in conformity with the Interstate Commerce Act, as amended (Sec. 3, 36 St. L. 544), but the Postmaster General has annually fixed the rates to be charged by respondent and

other telegraph companies for telegrams and cablegrams " between the several Departments of the Government and *their officers and agents.*" These " government rates " for the months of June and July, 1922, when the messages in this case were despatched, were 40% of the " commercial rates " for telegrams and 50% of the " commercial rates " for cablegrams, (R. 6).

The extent of respondent's obligations under this Act was questioned in a letter to the Postmaster General dated June 20, 1873, wherein respondent suggested that " the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at ' government rates ' • • • ." This letter was referred to the Attorney General (14 Op. A. G. 278, R. 19) who ruled that the only limitation applicable to a claim for the " government rate " is that " the telegraphing must be in cases where the rates are payable out of public moneys or are to be accounted for to the Government by the officer making the expenditure."

On May 23, 1922, respondent notified petitioner that thereafter the " government rate " and priority on all telegraphic communications sent or received by it would be denied and the " commercial rates " thereon demanded. (R. 18.) Following this notice bills were presented at the " commercial rates " for all messages transmitted during June

and July, 1922. On July 18, 1922, the Chairman of the United States Shipping Board requested the opinion of the Comptroller General as to whether petitioner should pay the bills so rendered by respondent at the "commercial rate." Thereupon the Comptroller General ruled (2 Comp. Gen'l Dec. 38) that the status of petitioner as an agent of the United States Shipping Board was fixed by Sections 12 and 35 of the Merchant Marine Act, 1920; that the status of the funds expended by petitioner is fixed by Section 14 of said Act and by the Acts of July 1, 1918 (40 St. L. 651), and of March 20, 1922 (42 St. L. 444); and that petitioner's telegrams are subject to the provisions of Section 5266 R. S. and the rates fixed by the Postmaster General thereunder. In accordance with this decision payment of said bills at "commercial rates" was refused and the present suit was instituted by respondent.

Petitioner is a corporation, organized by the United States Shipping Board, pursuant to the authority vested in said Board by Section 11 of Shipping Act, 1916, to carry out the purpose of said Act, and was incorporated under the laws of the District of Columbia on April 16, 1917, (R. 8). During the period from July 11, 1917, to June 5, 1920, petitioner acted as an agent of the United States, in carrying out the Government's emergency ship building, ship requisitioning and ship operation program, pursuant to delegations of

authority contained in Acts of Congress, numerous Executive Orders and resolutions of the United States Shipping Board, (R. 8, 9).

The Merchant Marine Act, approved June 5, 1920, repealed the Act of June 15, 1917, and emergency war legislation amendatory thereof (Sec. 2(a)), and conferred further broad governmental powers upon the United States Shipping Board, including the completion of the Government's construction program (Sec. 2(b)), the reconditioning and repair of the Government's ships and the operation thereof (Sec. 12) and the sale of the Government's merchant marine (Secs. 5, 6, 7) and other property acquired by the United States during the war emergency (Sec. 13).

During the period when the messages involved in this suit (R. 38 to 44) were sent petitioner's activities were exclusively those delegated to it by resolution of said Board duly adopted September 30, 1921, referred to in the petition herein (R. 14 and 30, 31, 32).

This Board resolution (R. 31) followed the intent and spirit of Section 35, Merchant Marine Act, by providing that the power and authority vested in the Board by said Act shall " be exercised *by it* through the United States Shipping Board Emergency Fleet Corporation," in numerous activities therein specifically set forth. All of the messages in controversy related to the activities so delegated to petitioner, (R. 18).

The revenues collected by petitioner on account of its delegated functions are revenues of the United States (Sec. 14, Merchant Marine Act), which are annually reappropriated by Congress, and since these revenues have been insufficient to cover petitioner's expenditures as such agent Congress has from time to time appropriated from the Treasury of the United States very large sums of money to be expended by the United States Shipping Board, through your petitioner, to cover the losses annually sustained by the Government in carrying out the provisions of the Merchant Marine Act. (Reference to these appropriation acts will be found on p. 12 of this brief.) Petitioner is obligated to account to the United States for all expenditures made from such appropriations because of its activities as such agent. (2nd Deficiency Act, 1922, approved March 20, 1922, 42 St. L. 444.) The Emergency Fleet Corporation had not, during the period here involved, any corporate funds; i. e., any funds belonging to it as a corporation. Payment for the telegrams is to be made out of funds belonging to the United States and appropriated by Acts of Congress.

SPECIFICATION OF ERROR TO BE URGED

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Court of Appeals of the District of Columbia are:

1. In failing to give proper weight to the practical construction placed upon the terms of a contract by the parties thereto and followed in a course of dealing over a period of forty-nine years.

2. In holding that respondent may be permitted to deny priority in transmission and the "government rate" on any messages which are to be paid for from public funds.

3. In holding that in sending the messages in controversy petitioner was not acting as an agent of the United States Shipping Board, a department of the Government within the meaning of Section 5266 R. S.

ARGUMENT

I

In sending the messages in controversy the Emergency Fleet Corporation was acting as an agent of a department of the Government within the meaning of the Post Roads Act.

The record establishes the fact that these telegrams were sent by the Emergency Fleet Corporation for the account of the United States and as an agent of the United States; that the cost of the messages is to be paid out of public funds; that such income as the Fleet Corporation collects is collected for the account of the United States and must be covered into the public Treasury, and that the expenditures of the Fleet Corporation are made out of moneys appropriated by Congress.

With respect to the language of the Post Roads Act, it may be said that in the interpretation of

contracts and statutes words are generally to be taken in their natural and ordinary significance. While the word " Department " is used in this Act, Congress no doubt intended to cover all branches, bureaus, and other establishments of the Government by whatsoever name designated. There is no reason to suppose that Congress intended to limit the application of the word to those main executive departments headed by cabinet officers. The Shipping Board is now composed of seven Commissioners appointed by the President with the advice and consent of the Senate, and Congress annually appropriates large sums of money from the Treasury for the Board's expenses and for its expenses in carrying out its duties and functions as provided in the Merchant Marine Act, 1920. If the Shipping Board is not a " Department," it would seem to follow that the Government's right to priority and the Government rate on messages sent by the Commerce Commission, Panama Canal, the Veterans' Bureau, and all the other numerous Governmental boards, commissions, bureaus, and judicial and legislative establishments which are not called Departments, could be denied by the respondent and by other telegraph companies.

We do not contend that the Emergency Fleet Corporation is a Department of the Government, but it is contended that the Shipping Board is a Department within the meaning of the Post Roads Act and that the Emergency Fleet Corporation in sending the messages was acting as an agent of

the Shipping Board. In the *Sloan-Astoria-Eastern Shore cases*, 258 U. S. 549, in passing upon the status of the petitioner under the Shipping Act, 1916, and the War Emergency Legislation, this court declared that petitioner was an agency of the Government; also in the *Lake Monroe case*, 250 U. S. 246, this court said that petitioner " was but an operating agency of the Board " and that " The Shipping Board had been established as a public commission with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds." Petitioner was also described as an operating agent of the Board in *U. S. v. Strang*, 254 U. S. 491, and as an instrumentality of the Government in *U. S. v. Walters*, 263 U. S. 15, 17, and 18; while in the *Freygang case*, decided with *Russell Motor Car Company v. U. S.*, 261 U. S. 514, this court held that in carrying out the war powers delegated to petitioner by the President, its status was no different from that of the Secretary of the Navy acting under a similar delegation (p. 524). If petitioner had the status of an agent of the United States Shipping Board, a Department of the Government, prior to enactment of the Merchant Marine Act, it does not seem arguable that petitioner was not also acting as such agent when the messages in controversy were despatched.

In Sections 12 and 35 of that Act (p. 10, 11 of this brief) Congress expressly authorized the Board to

carry out many of the duties and functions of the Board through the agency of the petitioner. By resolution duly adopted, the Board directed and authorized petitioner to carry on certain activities for the Board. The messages in question were despatched in connection with such activities. They must be paid for from public funds appropriated by Congress. These facts are undisputed and appear in the record.

If the activities of the Emergency Fleet Corporation here involved were conducted wholly on its corporate account, and the Treasury of the United States was only indirectly effected, through ownership of some stock in the Fleet Corporation, a different situation would be presented. The opinion of the Court below proceeds on the theory that this case was ruled by the doctrine announced by this court in *Bank of United States* v. *Planter's Bank of Georgia*, 9 Wheat. 904, and followed by the Court of Appeals of the Second Circuit in *Commercial Pacific Cable Company* v. *Philippine National Bank*, 263 Fed. 218. We think the Court below failed to distinguish between the relation the Government sustains to a corporation in which it is a mere stockholder and its relation as principal to a corporation employed as its agent. It is not contended here as it was in the *Philippine National Bank case*, that the ownership by the United States of stock in a corporation gives petitioner the right to claim priority in transmission and the Govern-

ment rave on the corporation's messages. It is not apparent how the statement in *Bank of United States* v. *Planter's Bank of Georgia*, with respect to the status of the Government as a stockholder, has any important bearing on this case.

The Post Roads Act does not by its terms make any distinction between the classes of activities in which the Government may send telegrams at the reduced rates fixed by the statute. The activities of the United States through the United States Shipping Board and the Emergency Fleet Corporation are, of course, public and in the public interest; otherwise it would not be lawful to conduct them at all. The United States does not and cannot hold property as a monarch may, for private and personal purposes. Under a republican form of government, the whole property of the Government is owned and held by the State for public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158, 159, 174. These activities are as much of a public nature and in the public interest as the operation of the Panama Canal and the collection of tolls therefrom. It is not essential to a public use that it be absolutely free and without a charge to anyone. The State may build a railroad and charge tolls for passengers and freight. It is, nevertheless, a public function which it is exercising, and the property is devoted to public uses. *Gibbons* v. *Ogden*, 9 Wheat. 694. That the ownership and operation of commercial vessels may be considered a proper

Governmental activity is disclosed in *Berizzi Bros. Co.* v. *Steamship Pesaro,* decided by this court June 7, 1926.

II

The Post Roads Act, properly construed, gives the United States the benefit of rates fixed by the Postmaster General where the cost of the messages is a direct charge against the Public Treasury without regard to the particular activity conducted by the Government.

Unless the operations which the United States is engaged in through the agency of the Shipping Board and the Emergency Fleet Corporation are of such a character that the contract contained in the Post Roads Act does not entitle the United States to the Government rate on messages sent in the conduct of those operations, the case is fairly within the terms of the Post Roads Act. If it be argued that the right of the United States to send messages at rates fixed by the Postmaster General, as prescribed in the Post Roads Act, is limited to messages in connection with activities which are strictly Governmental in their nature, it may be said that there is no express exception in the Post Roads Act, excluding from its operation any class of Government messages sent in any particular kind of activity in which the United States may lawfully engage. If the parties intended that the right to the reduced rates should be limited to telegrams sent in connection with purely sovereign

or strictly Governmental activities, the Act would have so provided. There is no reason why the court should read such an exception into the statute.

Moreover, it is confidently asserted that the promotion and maintenance of the American Merchant Marine to serve as a naval or military auxiliary in time of war or national emergency and to promote the growth of the foreign and domestic commerce of the United States, which is the purpose of the Merchant Marine Act as declared in its title and the opening paragraph, can not be considered a mere commercial or business venture in which the United States is engaging in a proprietary capacity. *U. S.* v. *Porto Rico Fruit Union*, 12 Fed. (2nd) 961–2.

The Government parted with something of value in the enactment of the Post Roads Act. In consideration of the property granted by the Government, it was given the right to transmit messages relating to Government business, at rates to be fixed by one of its officers, and the purpose of this provision was to make a saving for the public Treasury. There is nothing in the Act to justify the conclusion that this saving to the public Treasury should only be allowed where the activities of the United States were of a special or limited class.

In 1873, the Attorney General in an opinion to the Postmaster General (14 Op. A. G. 78) said that the test to the right of the Government rates

was whether "the tolls are to become a charge against the United States, payable out of the Treasury." In that case, the charges were paid by the United States Marshals out of moneys collected by them for fees, the net amount of which was coverable into the Treasury, and the Attorney General said that the payment of the higher rates would be "as much of a loss to the Treasury as though the money had been directly appropriated therefrom for that purpose."

The Post Roads Act constitutes a contract between the United States and the Telegraph Companies who have accepted its provisions, and it should be fairly construed to carry out the purposes of the parties. There has been a practical construction of the contract between the United States and this respondent which should be persuasive. The opinion of the Attorney General above referred to was rendered in a controversy between the Western Union Telegraph Company and the United States. Ever since that opinion was rendered, the principle therein announced has been applied by the parties in the construction of the Post Roads Act. From the time of the organization of the United States Shipping Board and the Emergency Fleet Corporation in 1917 until 1922, the respondent transmitted messages for the Fleet Corporation at Government rates without any suggestion that the Post Roads Act did not require it. A list of various Boards, Commissions, and Agencies of the Government to whose messages the Gov-

ernment rates have been applied, is set forth at page 19 of the record.

A minor question, raised by the fact that all of the messages were not sent by the Fleet Corporation to another agent or officer of the United States, is whether the Government must be both sender and receiver in order to be entitled to the Government rates. The practical construction has been the other way. If the language of a contract is indefinite or of doubtful construction, the practical construction placed upon it by the parties will generally be adopted by the Courts. *Topliff* v. *Topliff*, 122 U. S. 121.

This case is one in which the jurisdiction of this court may properly be exercised by the issuance of the writ.

Respectfully submitted.

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